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IN THE

Supreme Court of the United States

LINDA LINGLE, GOVERNOR OF THE STATE OF HAWAII, *et al.*,

Petitioners,

v.

CHEVRON USA, INC.,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. Whether the Just Compensation Clause authorizes a court to invalidate state economic legislation on its face and enjoin enforcement of the law on the basis that the legislation does not substantially advance a legitimate state interest, without regard to whether the challenged law diminishes the economic value or usefulness of any property.

2. Whether a court, in determining under the Just Compensation Clause whether state economic legislation substantially advances a legitimate state interest, should apply a deferential standard of review equivalent to that traditionally applied to economic legislation under the Due Process and Equal Protection Clauses, or may instead substitute its judgment for that of the legislature by determining *de novo*, by a preponderance of the evidence at trial, whether the legislation will be effective in achieving its goals.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

STATEMENT 1

SUMMARY OF ARGUMENT 4

ARGUMENT 5

I. THE CHOICE BETWEEN THE TAKINGS AND DUE PROCESS CLAUSES DOES NOT AFFECT ANALYSIS. 5

II. UNDER ANY AVAILABLE STANDARD, HAWAII'S RENT CONTROL SCHEME REPRESENTS A PARADIGMATIC VIOLATION OF THE TAKINGS CLAUSE. 11

A. Hawaii's Act 257 Fails Even The Deferential Takings Analysis Applied In The "Rate Cases". 11

B. Act 257 Violates The Principle That Public Burdens Must Be Borne By The Public As A Whole, Making Heightened Scrutiny Appropriate. 15

C. Hawaii's Act 257 Constitutes A *Per Se* Violation Of The Takings Clause Because It Effects A "Physical" Taking. 20

CONCLUSION 29

TABLE OF AUTHORITIES

CASES **Page(s)**

Agins v. City of Tiburon, 447 U.S. 255 (1980).....7

Armstrong v. United States, 364 U.S. 40 (1960).....15

Barron v. Mayor of Baltimore, 32 U.S. 243 (1833).....10

Block v. Hirsh, 256 U.S. 135 (1921).....27

Blue Shield of Va. v. McCready, 457 U.S. 465 (1982).....5, 8

Brunswick v. Pueblo Bowl-O-Mat, 429 U.S. 477 (1977).....8

Chevron USA, Inc. v. Cayetano, 198 F. Supp. 2d 1182 (D. Haw. 2002).....4

Chevron USA, Inc. v. Lingle, 363 F.3d 846 (9th Cir. 2004) 2, 4, 19

Chicago, Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226 (1897).....10, 11

Duquesne Light Co. v. Barasch, 488 U.S. 299 (1989).....11, 12, 13

Eastern Enters. v. Apfel, 524 U.S. 498 (1998).....9, 10, 11

FCC v. Beach Communications, 508 U.S. 307 (1993).....12

Federal Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591 (1944) 8, 12

Fertilizing Co. v. Hyde Park, 97 U.S. 659 (1878).....7

Fitzgerald v. Chrysler Corp., 116 F.3d 225 (7th Cir. 1997) 29

Hall v. City of Santa Barbara, 833 F.2d 1270 (9th Cir. 1986) 17

Hawaii Housing Auth. v. Midkiff, 467 U.S. 229 (1984).....6

Jersey Central Power & Light Co. v. FERC, 810 F.2d 1168 (D.C. Cir. 1987).....13

Kaiser Aetna v. United States, 444 U.S. 164 (1979).....21, 24, 25

Lochner v. New York, 198 U.S. 45 (1905) 9

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) 24

Lucas v. South Carolina Coastal Comm'n, 505 U.S. 1003 (1992) 7

Matsushita Electric Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986) 2

Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978) 21

Pennell v. City of San Jose, 485 U.S. 1 (1988).....17, 18

Permian Basin Area Rate Cases, 390 U.S. 747 (1968).....13

Preseault v. Interstate Commerce Comm'n, 853 F.2d 145 (2d Cir. 1988) ("*Preseault I*").....25

Preseault v. Interstate Commerce Comm'n, 494 U.S. 1 (1990) ("*Preseault II*") 26

Preseault v. United States, 100 F.3d 1525 (Fed. Cir. 1996) ("*Preseault III*").....21, 25, 26, 27

Railroad Retirement Bd. v. Alton R. Co., 295 U.S. 330 (1935) 9

Smyth v. Ames, 171 U.S. 361 (1898) 8

United States v. Aluminum Co. of Am., 148 27 F.2d 416 (2d Cir. 1945) 28

United States v. General Dynamics Corp., 415 U.S. 486 (1974) 14

United States v. Grinnell Corp., 384 U.S. 563 (1966) 14

Usery v. Turner-Elkhorn Mining Co., 428 U.S. 1 (1976) 9

Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) 7, 15, 16

Yee v. City of Escondido, 503 U.S. 519 (1992) 15, 16

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. V 23

CODES AND STATUTES

16 U.S.C. § 1247(d) 25

Cal. Civ. Code § 798.72 16

Cal. Civ. Code § 798.73 16

Cal. Civ. Code § 798.74 16

Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. §§ 9701-9722 9

Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. § 403 24

OTHER AUTHORITIES

Brief for the Petitioners ..... *passim*

Brief of Cato Institute as *Amicus Curiae* in Support of Petitioners, *Kelo v. City of New London*, No. 04-108 6

Lord Bramwell, *Laissez Faire* (1884) 5

Milton Friedman & George Stigler, *Roofs or Ceilings, the Current Housing Problem*, in *Rent Control: Myths and Realities* (The Fraser Inst. ed. 1981) 27

Richard A. Epstein, *Rent Control and the Theory of Efficient Regulation*, 54 Brooklyn L. Rev. 741 (1988) 7

Robert Nozick, *Anarchy, State and Utopia* (1974) 23

William Fischel, *Regulatory Takings: Law, Economics, and Politics* (Cambridge 1995) 17

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute was established in 1977 as a non-partisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government, especially the proposition that the U.S. Constitution establishes a government of delegated, enumerated, and thus limited powers. Toward that end, the Institute and the Center undertake a wide range of publications and programs, including, notably, the annual *Cato Supreme Court Review*. Counsel of Record for this brief is Professor Richard A. Epstein, a leading constitutional law scholar. The instant case raises squarely the question of the limits on state governments' power under the Takings Clause and is thus of interest to the Cato Institute and its Center for Constitutional Studies.

STATEMENT

1. Hawaii Act 257 ("Act 257" or "the Act") establishes an elaborate rent control scheme applicable to oil and gas companies ("landlords") that lease gas stations to in-state independent dealers ("tenants"). The Act stipulates that a landlord may charge its tenants a rent that exceeds the sum of (1) 15 percent of the tenant's gasoline profit and (2) 15 percent of the tenant's gross profits on any products other than gasoline. Pet. App. 2-3.

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[1] Pursuant to this Court's Rule 37.3(a), letters of consent from all parties to the filing of this brief have been submitted to the Clerk. Pursuant to this Court's Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus* or its counsel made a monetary contribution to the preparation or submission of this brief.

2. The Act also interferes with the landlord's right of possession. Ordinarily, of course, the right of possession permanently reverts to the landlord at the expiration of a lease's term. The Act, however, bars landlords from converting a leased gas station, run by a tenant dealer, into a company-run gas station when an existing lease expires. Pet. App. 2.[2] It also requires lease renewal terms to be "construed" to grant incumbent tenants a three-year term, as of the operative date of the statute. Pet. App. 3. Finally, it bars the landlord from opening a company-run gas station within a given geographic proximity to the existing, rent-controlled tenant-run gas station. Pet. App. 3. As a result, the Act entrenches incumbent tenants, who are more difficult to remove from the landlord's distribution system.

3. The Act reduces landlords' flexibility to price their goods and services. For example, respondent Chevron ("respondent" or "Chevron") decided to change its general leasing formula, not only in Hawaii but throughout the United States, in order to increase financial returns (a unilateral price change legal under the antitrust laws so long as Chevron does not act in concert with its rivals.)[3] *See Chevron USA, Inc. v. Lingle*, 363 F.3d 846, 848 (9th Cir. 2004). Act 257's rent control provisions, however, effectively prevent such increases and/or block future rent increases in excess of those allowable under the statute.[4]

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[2] The Act grants a limited exception, in cases where the tenant either has abandoned the property or the lease is not properly renewed, only if the landlord is not able to immediately replace the tenant with a new local independent dealer. Pet. App. 2-3. The exception lasts "until a [new] dealer may be found" and is capped at 24 months. Pet. App. 2-3.

[3] *Matsushita Electric Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986).

[4] To be sure, the Hawaii statute does allow for some additional rent increases, which are tied to the increase in the level of ground rents. Pet. App. 3. But it makes no provision whatsoever for rent increases attributable to, say, enhanced demand for gas brought about by

4. Under the Act, a tenant leasing an oil company's property is not required to pass any savings it receives under the statute to customers; gas station consumers can be charged the same prices for gasoline and for other goods and services that they were charged before the passage of the Act. Nor does the Act impose restrictions on the prices that the incumbent tenant is able to charge when assigning its leasehold interest to a third-party ("sub-tenant"). As a result the tenant can "lease-out" the landlord's property to sub-tenants for the same price the landlord could have charged in Act 257 had not been passed.

5. The Act is not justified by reference to any existing anticompetitive harm stemming from the structure of the oil market. Instead, petitioners justify the Act based on the risk of future "economic harm" that might occur if the "wholesale market . . . *were* to become concentrated in the hands of the few oil companies serving the islands." Pet. Br. 4 (emphasis added). *See also id.* at 9 & n.4. That risk is wholly hypothetical, as it has not materialized in the many decades in which gasoline has been sold in Hawaii.

6. Act 257 effectively transfers the wealth of the landlord, an out-of-state company, to independent in-state tenants, who are local citizens and voters. So long as these tenants remain in possession, they benefit from the rent reductions that Act 257 mandates. When the tenants, in turn, assign their property to sub-tenants, the statute permits them to charge a premium equal to the present discounted value of the statutory savings under the Act. Put another way, the sub-tenant pays the same amount for the sub-lease that it would pay if the rent control statute were not in effect, but a portion of this payment (the "premium") goes to the tenant, rather than to the landlord. Viewed from a purely financial perspective, consumers are made neither better nor worse off

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population growth. As explained in Part II, such "demand-side" increases are taken by the statute from the landlord and given to the present tenant in possession of the property.

by Act 257, which merely shifts wealth from landlords to incumbent tenants.

7. Respondent challenged the statute under the Takings Clause, alleging that the rent control provisions take Chevron's property without just compensation. The district court and the Ninth Circuit ruled in respondent's favor. *Chevron USA, Inc.* v. *Cayetano*, 198 F. Supp. 2d 1182 (D. Haw. 2002), *aff'd Chevron v. Lingle*, 363 F.3d 846 (9th Cir. 2004). On appeal, petitioners contend that the choice between the Due Process Clause and Takings Clause should affect the standard of review brought to bear. The Due Process Clause is said by petitioners to require an extremely deferential standard of scrutiny.

SUMMARY OF ARGUMENT

The question put to this Court is straightforward: Does Act 257 serve any conceivable public interest? The answer is equally clear: Its sole effect is to confiscate a landlord's property rights for the benefit of in-state tenants. The economic analysis is both simple, and stark: The Act extinguishes the landlord's right to raise the rent on current tenants. He therefore cannot capitalize on appreciation of leasehold property. Existing tenants, by contrast, are granted the power to sublease the landlord's property to a third party, and may do so free from any rent restrictions. As a result, the tenant is given the power to profit from the rising value of the landlord's property. This is confiscation, pure and simple.

This statute cannot be justified as a land use restriction, because it does not change the use of the property. Nor is it plausibly justified as a remedy for monopoly behavior, since Hawaii makes no showing that the gas companies violated antitrust laws. Indeed, Hawaii concedes that the Act will not lower prices currently charged consumers, the traditional goal of antitrust policy. *See, e.g.*, Pet. Br. 9 n.4 (the States "did not contend . . . that Act 257 would have the effect of reducing current prices"; rather, the goal of the Act is to prevent a potential price increase that might occur sometime

in the future).[5] From whatever angle this statute is analyzed, the same conclusion follows: Act 257 accomplishes a naked transfer of wealth to a discrete class of preferred local residents who are entrenched not only in their leasehold interests but, so far as it appears, in their jobs as well. This entrenchment makes this statute far more intrusive than the ordinary rent control law. In short, it lacks any sensible public justification. Whether its decision is analyzed under the Due Process Clause or the Takings Clause, the court of appeals should be affirmed.

ARGUMENT

I. THE CHOICE BETWEEN THE TAKINGS AND DUE PROCESS CLAUSES DOES NOT CHANGE ANALYSIS.

Both the decision below and petitioners' briefs before this Court expend pages arguing that the Due Process Clause and the Takings Clauses compel different results on the facts of this case. That debate, however, is wholly irrelevant to the outcome here. To see why, it is useful to review the array of harmful private conduct that the state may combat through its police powers. That inquiry throws the constitutional flaws of Act 257 into sharp relief, no matter the avenue of analysis invoked, by underscoring that petitioners have not identified a public purpose that justifies the Act's interference with Chevron's property interests.

1. As an initial matter, in dealing with human events, it is generally safe to assume that most individuals understand their own interests, and thus should be free to act in whatever fashion they see fit. Nonetheless, that presumption, whether applied to one's person or property, has never been absolute, even in the eyes of the most ardent advocates of laissez faire principles. *See* Lord Bramwell, *Laissez Faire* 8 (1884) ("All

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[5] *Compare Blue Shield of Va. v. McCready*, 457 U.S. 465, 475 n.11 (1982) (antitrust policy designed to deter "tangible," rather than "speculative," economic harm).

that the advocates of laissez faire demand, is that freedom of contract shall not be interfered with without good reason."). As a result, the vast majority of debates over the propriety of regulatory intervention inevitably collapse into debates about the state's *burden* of justification.

It is clear that some scrutiny of state purposes is constitutionally necessary: This is a clear implication of the text of the Takings Clause, which contains an explicit set of substantive requirements: "Nor shall private property be taken for public use without just compensation." U.S. Const. amend. V. The first question posed by the Clause is whether dispossession of property serves a "public use." That restraint prevents the state taking property from A and giving it to B, and forces courts to closely consider whether a taking truly serves a general public interest.

Here, the "public" purpose putatively advanced is the control of oligopoly. *See Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229 (1984) (suggesting that the control of oligopoly—the very interest asserted by Hawaii in this case—may justify transfer of property from landlords to sitting tenants). In our view, this allegation, and indeed all assertions of public use, deserves scrutiny. *See* Brief of Cato Institute as *Amicus Curiae* in Support of Petitioners, *Kelo v. City of New London*, No. 04-108. Rent control systems necessarily interfere with the landlord's power over his premises. It is therefore fair to require a showing that some real public interest is advanced in fact by the state's constructive transfer of property interests from the landlord to the tenant.

2. The absence of any public interest at issue in this case, whether scrutinized under the Due Process or Takings Clause, is underscored by reference to state police powers. Consider, first, the least controversial class of abuses that may be addressed by the police power: nuisances. Everyone (even those who adopt the most aggressive interpretation of due process and takings law) concedes that the state, as an agent of the public at large, may confront and control

common law nuisances. *See, e.g., Fertilizing Co. v. Hyde Park*, 97 U.S. 659 (1878); *Lucas v. South Carolina Coastal Comm'n*, 505 U.S. 1003, 1023-30 (1992) (discussing nuisance limitations). Moreover, the degree of state power should be large enough to deal with the full range of incompatible uses that often arise between neighbors. To be sure, imposition of zoning restrictions to accomplish the same end is controversial. But in these cases, too, courts have generally sustained zoning regulations pursuant to this Court's decision in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).[6] Nuisance is not at issue here, because this case does not raise issues about the nature of the land use in question. The gasoline stations at issue will be put to the same uses no matter whether Act 257 survives or is struck down.[7] Any deferential standard appropriate to nuisance or land use regulations is therefore inapplicable.

The second class of potential abuses that may be addressed by a state's police power is monopoly pricing. The danger here is that any person possessed of exclusive power to sell a given commodity will charge an anticompetitive price, generating resource misallocations. A system of rate regulation is often adopted by states under these circumstances to prevent that misallocation. Even so,

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[6] *Agins*, which states that a regulation must "substantially advance[] a legitimate state interest," was a land use decision, and the *Agins* test is, like *Euclid*'s, just such a deferential standard of review. *See, e.g., Agins v. City of Tiburon*, 447 U.S. 255, 261 (1980) (upholding a five-acre minimum lot requirement, based on state's asserted desire to prevent the "ills of urbanization"). In our view, however, *Agins* went far beyond the anti-nuisance rationales that form the appropriate bases for state intervention, because it failed to show that, on average, the lot requirement worked to the reciprocal advantage of neighbors.

[7] For, example, height restrictions raise externality problems that are not found in any rent control statute, including Act 257. *See* Richard A. Epstein, *Rent Control and the Theory of Efficient Regulation*, 54 Brooklyn L. Rev. 741, 747 & n.9 (1988).

courts have recognized a need for constitutional intervention to prevent state officials from pushing the rates so low that the regulated monopolist will not be able to recover its initial capital investment plus a reasonable rate of return. There are many different ways in which to calculate the rate base and the associated rate of return. *Contrast Smyth v. Ames*, 171 U.S. 361 (1898) (rate base consists of property used or usable in the business), *with Federal Power Comm'n v. Hope Natural Gas*, 320 U.S. 591 (1944) (rate base equal to capital invested). But no matter which test is used, these "rate cases" always call for some stricter standard of scrutiny than the land use cases. They involve simple financial transactions, in which there is no need to balance neighboring property interests. The only state interest is guaranteeing access to, and preventing the mis-pricing of, essential services supplied by a natural monopolist. In this case, however, petitioners have not even shown the existence of monopoly power, much less its abuse. They have made no showing of any present competitive harm, nor a violation of antitrust laws. Act 257 is merely designed to prevent the speculative risk of a *hypothesized* concentration of retail market power by oil companies sometime in the future. *See* Pet. App. 4 (asserting aim of the Act is to prevent the future "economic harm" that "would occur *if* the retail market were to become concentrated") (emphasis added).[8]

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[8] *Compare McCready*, 457 U.S. at 475 n.11 (antitrust designed to combat "tangible," rather than "abstract" or "speculative," conceptions of economic harm). Given that the statute expressly protects local distributors from competition with company-owned stations (*see, e.g.*, Pet. App. 3 (limiting company power to open stations in proximity to leased stations)), Hawaii's putative interest in competition rings particularly hollow. *See, e.g., Brunswick v. Pueblo Bowl-O-Mat*, 429 U.S. 477, 488 (1977) (rejecting claims of small competitors premised on putative injury that resulted from acquisitions of competitor, because antitrust laws were enacted for "the protection of *competition*, not *competitors*") (emphasis added).

A third possible state regulatory interest is remedying danger or hardship to workers. The petitioners constantly refer to this Court's decision in *Lochner v. New York*, 198 U.S. 45 (1905), as the fountain of all evils. In fact, the *Lochner* Court considered whether a maximum hours statute was within the legislative power of a state, an interest in no way implicated here. Nor does this case involve the claims of retirees who have suffered reversals in the financial market as the result of retroactive changes to a state-funded retirement plan. *See, e.g., Railroad Retirement Bd. v. Alton R. Co.*, 295 U.S. 330 (1935) (striking down retroactive federal regulation of state pension plans, and holding such regulation is within the police power of the states).[9] Like nuisance laws and monopoly pricing, this is not an interest implicated by Act 257.

3. Unable to identify a concrete public purpose at stake, petitioners advocate a switch to due process scrutiny, which they claim permits extreme deference to any state ends that might be articulated in the course of litigation. *See, e.g.*, Pet. Br. 37, 38 & n.13. They seize on Justice Kennedy's partial dissent in *Eastern Enters. v. Apfel*, 524 U.S. 498 (1998) (scrutinizing retroactive regulation of state pension plans), to justify this analytical switch. *See, e.g.*, Pet. Br. 30. *Eastern Enterprises* struck down portions of the Coal Industry Retiree Health Benefit Act of 1992 ("Coal Act"), 26 U.S.C. §§ 9701-22, which retroactively imposed a tax on coal operators to fund pensions for former employees. 524 U.S. at 510-11. Four justices voted to strike down the Coal Act based on the Takings Clause. *Id.* at 529. However, Justice Kennedy reasoned that the tax in question did not attach to any discrete piece of property, making due process analysis more appropriate. *Id.* at 547 (Kennedy, J., dissenting in part). It is this divergent analysis that petitioners claim dooms the takings standard applied below. Pet. Br. 30.

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[9] *Alton* was subsequently limited in *Usery v. Turner-Elkhorn Mining Co.*, 428 U.S. 1 (1976) (allowing retroactive impositions for the support of a black lung disease compensation program for retired coal miners).

Petitioners' reliance on *Eastern* as a fount for distinguishing the substance of "takings" and "due process" scrutiny is misguided. It is useful to compare the due process analysis in *Eastern* to the line of cases going back to the first Justice Harlan's decision in *Chicago, Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226 (1897). *Chicago Railroad* involved the condemnation of railroad property for which a jury awarded only nominal compensation. In attacking that judgment, Justice Harlan did not rely on the Takings Clause, which at that time had not been applied to the state (*Barron v. Mayor of Baltimore*, 32 U.S. 243, 247 (1833)), but on the Due Process Clause. As he said:

> In our opinion, a judgment of a state court, even if it be authorized by statute, whereby private property is taken for the State or under its direction for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the Fourteenth Amendment of the Constitution of the United States.

Id. at 241. Justice Harlan's opinion mirrors the substance of takings analysis and illustrates that a choice between the Due Process and Takings Clauses should not compel different conclusions. *Compare Eastern Enters.*, 524 U.S. at 542 (Kennedy, J., dissenting in part) (holding, in the course of striking down the Coal Act under the Due Process Clause, that "the burden imposed by the Coal Act may be just as great if the Government had appropriated one of Eastern's plants").[10]

The constant effort to distinguish the various types of interests and claims furthered by different clauses of the

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[10] This should have been a common sense implication of *Eastern*, even without reference to Justice Harlan's opinion in *Chicago Railroad*, given that the four-vote plurality and Justice Kennedy came out the same way in that case: *against* the federal regulation at issue.

Constitution creates an endless proliferation of unnecessary interpretive problems. The simple truth is that whether analyzed under the Due Process or the Takings Clause, the analysis is the same, and the constellation of relevant state interests that ground analysis are the same. At a minimum, petitioners' failure to identify any legitimate "public" interest—whether nuisance or abuse of monopoly power—dooms their case. *See, e.g., Chicago Railroad*, 166 U.S. at 241; *compare Eastern Enters.*, 524 U.S. at 549-50 (Kennedy, J., dissenting in part) (due process inquiry, applied to retroactive legislation, requires inquiry into "purposes" of legislature, including whether legislation promotes "general welfare").

II. UNDER ANY AVAILABLE STANDARD, HAWAII'S RENT CONTROL SCHEME REPRESENTS A PARADIGMATIC VIOLATION OF THE TAKINGS CLAUSE.

A. Hawaii's Act 257 Fails Even The Deferential Takings Analysis Applied In The "Rate Cases."

In their plea for deference to Act 257, the petitioners make no reference to any ratemaking decision of this Court, even though the Act in practice imposes a form of ratemaking. These cases are instructive here, for, in the context of challenges to utility rates, this Court has long recognized that the Takings Clause requires scrutiny not only of the purpose of a rate regulation but also of ratemaking methodology. *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 314 (1989). Review of the rate cases underscores two points: (1) that the exceedingly deferential "rationality" test proposed by petitioners is not the universal norm for "complex" regulatory questions; and (2) that petitioners fail even the relatively forgiving standard applied in the complex rate-setting context.

1. Hawaii boldly proclaims that Act 257 must be upheld "[e]ven if the legislature has not articulated a rationale for [the] law." Pet. Br. 38 n.15. Indeed, says Hawaii, "if 'any

state of facts either known or which could reasonably be assumed affords support for it,'" the Act must stand. *Id.* at 15. *See also id.* at 39 n.15 ("'Because we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason . . . actually motivated the legislature.'") (quoting *FCC v. Beach Communications*, 508 U.S. 307, 315 (1993)).

This test suffers in comparison to the deference afforded "complex" regulatory decision *par excellence*: rate-orders set by utility commissions. In *Duquesne Light Co. v. Barasch*, *supra*, the Court considered whether a state commission acted properly by refusing to add certain nuclear power plant expenditures, determined to be wasteful, to the rate base. The commission sought, and received, deference. Its argument was two-fold. First, it highlighted its use of a detailed method for valuation of the utility. Second, in response to complaints that its rate-setting methodology involved a number of disputed adjustments, the commission relied on this Court's statement in *Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591 (1944), which stressed that a court must look at the effect of the rate on the utility's bottom line. *Id.* at 602.

In *Duquesne*, this Court agreed that some deference to the commission was appropriate. It underscored, for example, that, when the commission applies its rate methodology, individual errors of calculation do not rise to a constitutional dimension:

> The economic judgments required in rate proceedings . . . do not admit of a single correct result. The Constitution is not designed to arbitrate these economic niceties. Errors to the detriment of one party may well be canceled out by countervailing errors or allowances in another part of the rate proceeding.

488 U.S. at 314. It did not, however, abdicate scrutiny of the rate-order, as Hawaii implicitly advocates. First, the Court

underscored the importance of an administrative record (*id.* at 310-11 (noting that whether a rate order is just depends "to some extent on" evaluation of the "risks under a particular rate-setting system, and on the amount of capital which the investors are entitled to earn")). Second, the Court scrutinized the return as a percentage of the utility's equity and rate base. *Id.* at 311. Third, the Court took care to stress that more than one adjustment had been made to the rate. *Id.* at 314 ("Inconsistencies in one aspect of the methodology have no constitutional effect on the utility's property if they are compensated by *countervailing* factors in some other aspect.") (emphasis added). The rationale for the last qualification is akin to economic "portfolio theory": It is more reasonable to assume that errors in a particular adjustment are harmless when they may be "balanced out" by other adjustments.

The Court also underscored that judicial oversight, at a minimum, is necessary to ensure that a rate commission does not "arbitrarily" "require[] investors to bear the risk of bad investments at some times while denying them the benefit of good investments at others." *Id.* at 315 (suggesting such an approach would raise "serious constitutional concerns"). Implicit in this proviso is that "deference" does not excuse a legislature's conclusory, or boilerplate, justification for a rate-change: As the Court itself emphasized, either the commission or the state legislature must have "performed" the requisite "work" necessary to "equitably reconcil[e]" the relevant regulatory interests at stake before deference is appropriate. *Id.* at 314. *See also Permian Basin Area Rate Cases*, 390 U.S. 747, 792 (1968) ("Judicial review . . . will function accurately and efficaciously only if the Commission indicates fully and carefully the methods by which, and the purposes for which, it has chosen to act, as well as its assessment of the consequences of its orders for the character . . . of the industry"); *Jersey Central Power & Light Co. v. FERC*, 810 F.2d 1168, 1177 (D.C. Cir. 1987) (emphasizing "the necessity for Commission findings, the existence of which is a necessary predicate to judicial deference").

2. Applied to this case, *Duquesne* would require, at a minimum, a showing far greater than Hawaii has made to date. It would, for example, require a legislative record that evidences Hawaii's consideration of the valuation of Chevron's leasehold property, its capitalization, and its anticipated rates of return under Act 257. The Hawaii legislature, of course, made no such showing. *Compare* Pet. App. 1-2 (legislative findings). It would also require a showing that multiple adjustments could "balance out." But, here, only *one* adjustment was made: The rents were capped. There is no basis for a kindly presumption that this single blunt adjustment, if ill-considered, will harmlessly be "balanced" away.

Nor, for that matter, has Hawaii demonstrated that it deliberated about the need for the cap, as *Duquesne* implicitly requires. The Hawaii legislature, for example, adduces only barebones incantations of market "concentration." Pet. App. 1. That boilerplate is not accompanied by any concrete factual findings of the sort that even the most elementary notions of procedural due process would require. The minimalist findings of Act 257, for example, offer no concrete evidence that Chevron's putative market share is tantamount to monopoly power. *Compare United States v. Grinnell Corp.*, 384 U.S. 563 (1966). Nor does the legislative record offer evidence that the Hawaii legislature considered any of the relevant indicators of market concentration under federal or state law: including barriers to entry, price elasticity, and other factors relevant to definition of the product and/or geographic markets. *See, e.g., United States v. General Dynamics Corp.*, 415 U.S. 486 (1974) (discussing evidentiary requirements to show improper market concentration under Section 7 of the Clayton Act). Indeed, in an ever-shifting attempt to supply post-hoc justifications for the Act, petitioners now suggest the Act merely prevents future economic harm that might occur "*if* the retail market, like the wholesale market, were to become concentrated." Pet. Br. 4 (emphasis added).

The vacuous and shifting nature of the findings offered in support of Act 257 isn't surprising: After all, it is unlikely that a legislature has done the "work" necessary to reach a fair result if, as Hawaii says, the Takings Clause does not require a legislature to "articulate[] a rationale" (Pet. Br. 38 n.15) for regulatory intervention in the first place. *Duquesne* underscores that, at a minimum, some record of meaningful deliberation must exist if Hawaii is to qualify for deference. Lacking such a record, Act 257 fails even the deferential review owed rate commissions.

B. Act 257 Violates The Principle That Public Burdens Must Be Borne By The Public As A Whole, Making Heightened Scrutiny Appropriate.

While Hawaii fails the deferential standard articulated in *Duquesne*, rational basis should not be considered a ceiling on scrutiny of Act 257. Utilities are natural monopolies; as such, they are subject to public oversight, presumptively in the public interest, even if that oversight is prone to error. By contrast, rent control statutes carry a special risk: they may disguise a naked wealth transfer, one that is not in the public interest but rather in the interest of a narrow voting bloc. That risk, in turn, goes to the heart of the takings principle, which holds that "public burdens" must be borne by "the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). It is, in short, a risk that justifies enhanced scrutiny and, as the Ninth Circuit rightly determined, just compensation.

The risk that rent-control regulation will disguise naked, rent-seeking wealth transfers is amply illustrated by *Yee v. City of Escondido*, 503 U.S. 519 (1992).[11] In *Yee*, the Court was presented with the "unusual" economic relationship (*id.* at 526) at the heart of the mobile home industry. Most

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[11] Petitioners in *Yee* did not raise, and the Court did not consider, the question whether the regulation violated the regulatory taking line of cases.

"mobile home" owners do not hold title to the land on which their homes are located; rather, they rent land for their homes ("mobile home pads") in so-called mobile home parks. *Id.* at 523. The lease carries a risk of exploitation by the landlord because, once a home is situated on a "pad," the cost of moving it is high relative to its value. *Id.* It is, in other words, *im*mobile. Because the renter must typically sell or abandon the unit upon moving, relocation typically results in a forced sale to the park owner, the only plausible buyer. The landlord is therefore situated to acquire the lessee's property at a cut-rate price.

The risk of exploitation might, in theory, be countered by the terms of the initial lease, which could specify a price formula when the mobile home owner wants to sell. Indeed, courts might sensibly imply a default rule that reaches this result where the lease agreement is silent. In *Yee*, however, the City of Escondido, took more drastic measures. It passed two complementary ordinances putatively designed to protect the renters.[12] These ordinances, however, were highly objectionable because in practice they accomplished a thorough-going, if disguised, expropriation of the landowners' proprietary interests. They extended the duration of the tenant's estate by limiting the landowners' power to evict. *See, e.g.*, Cal. Civ. Code § 798.73. They allowed the tenant to transfer the leasehold interest to a buyer that he alone could select. *Id.* §§ 798.72, 798.74. The landlord, in turn, was relegated to receiving a fixed rate of return stipulated by the legislature. 503 U.S. at 524. His

[12] The first, the Mobilehome Residency Law (Cal. Civ. Code §§ 798-799.51 (West 1982 & Supp. 1992)), limited the grounds on which the renter's lease could be terminated. Crucially, the law prohibited the landowner from restricting the ability of the renter to sublease his property during the life of the rental agreement. *Yee*, 503 U.S. at 524. The second ordinance was a local proposition, Proposition K, which imposed a tight rent control regime and permitted increase only with the approval of Escondido City Council. *Id.* at 524-25.

position was converted, in effect, from that of an owner to that of a creditor—at least if the market rose. If the value went down, the landlord continued to bear the loss. Moreover, the tenant was entitled to *sell* his interest in the property for a price. And, in turn, he received payment from the incoming tenant that equaled, in discounted present value, the same amount that the landlord would have received if the ordinance had never been passed. *Id.* at 527. In this situation, Judge Kozinski, assessing parallel mobile home regulations in Santa Barbara, said "it would be difficult to say that the ordinance does not transfer an interest in the [landowners'] land to others." *Hall v. City of Santa Barbara*, 833 F.2d 1270, 1277 (9th Cir. 1986).

This Escondido mobile home ordinance was not only confiscatory: It was also the undistilled product of raw political pandering. As William Fischel has demonstrated, mobile home-owners in Escondido were conservative, white Republicans, who went to the polls in droves, easily swamping the feeble opposition of park owners. They lobbied the city council heavily for the proposed regulations. And in a Republican locality, their clout carried the day. *See, e.g.*, William Fischel, *Regulatory Takings: Law, Economics, and Politics* 324 (Cambridge 1995) (discussing the political landscape in *Yee*). In effect, the renters had, under the disguise of "rent control," dispossessed the landowners through pure majoritarian muscle-flexing.

The disguised wealth transfer that took place in *Yee* and *Hall* is not an isolated problem: It is an inherent by-product of the political economy of rent control. Rent control ordinances permit wealth transfer from landlords to lessees to be achieved "off budget," immunizing the transfer from normal democratic oversight. In *Pennell v. City of San Jose*, 485 U.S. 1 (1988), for example, the City of San Jose imposed special limits on the power of landlords to raise the rent of "hardship tenants" (described as tenants making less than $32,400 a year). *Id.* at 23 n. (Scalia, J., dissenting). As Justice Scalia's dissent pointedly noted, that subsidy to leaseholders would have been unlikely to gain political

support if it had not been packaged as "rent-control." It was clear that the local citizens were not prepared to pay a rent supplement to these hardship tenants out of their own pockets. *Id.* at 22-23 (Scalia, J., dissenting) (noting it was just not in the cards to think that "citizens of San Jose would allow funds in the municipal treasury, from wherever derived, to be distributed to a family of four with income as high as $32,400 a year").

Together, *Yee* and Justice Scalia's dissection of the political economy of rent control raise cause for concern here. An out-of-state landlord, Chevron, has been forced to submit to a price control scheme that resembles the corrupt bargain at the heart of *Yee*. Chevron must acquiesce to tenants' possession of its property at a controlled price. The incumbent tenants are in turn granted the chance to contract with sub-tenants without the same rent restrictions, thereby recouping the premium Chevron has been denied. Indeed, in several respects, the scheme is worse than that analyzed in *Yee*, since it restricts Chevron's ability to take permanent possession of its property at the expiration of a lease (the necessary result of both the mandated "three year term" imposed on existing leases and the parallel prohibition on landlords' conversion of leased gas stations into company-run gas stations.) Pet. App. 2-3. Because this necessarily limits Chevron's ability to displace under-performing tenants, it amounts to a compulsory entrenchment of local labor, in which service arrangements with local distributors are effectively forced on a disfavored competitor. Making matters even worse, the asserted problem addressed by this regulation (the risk of future anticompetitive conduct resulting from oil companies' vertical integration in the retail market) is both unproven and, indeed, wholly speculative. The reality on the ground is simple, and troubling: A mere incantation of unproven "concentrated" market power among the landlord oil companies papers over the utter lack of record evidence that might assure accountability and protect against political pandering.

To be sure, there are some differences between the rent-seeking schemes described above and Act 257. Chief among them is that the landlord in *Yee* and *Hall* had no opportunity to recoup the losses imposed by the rent regulations. That is not true in this case because the landlords might recoup some of their lost rentals by charging higher prices for the goods and services (such as gas) that they sell to their tenants. As the Ninth Circuit noted, 363 F.3d at 855-57, the district court resolved a battle of two economic experts (John Umbeck, for Chevron, and Keith Leffler, for the state) over the economic consequences of the statute. Professor Umbeck took the position that the decrease in the rents would lead the landlords to increase the price of other products, which would be passed on to consumers. *Id.* at 856-57. Professor Leffler took the position that the prices to consumers would be lowered in virtue of the fact that the statute maintained an independent set of dealers. *Id.* at 857.

We regard this economic debate as largely inconclusive and wholly beside the point. First, we think it inconceivable that any restriction on the ability of the landlords to raise their rents would cause a wholesale price increase that would not have occurred otherwise. If the landlord oil companies had freedom to alter their prices, they would have done so prior to the Act's passage; otherwise, by leaving money on the table they would not have acted as profit maximizers. Professor Umbeck's testimony therefore is not credible. But neither is Professor Leffler's, because, in his desire to show that consumers will benefit from this situation, he ignores the obvious fact that the chief beneficiaries of (and chief lobbyists for) Act 257 are the incumbent tenants (the dealers) who will continue to charge what the market will bear. He does not explain, moreover, why entrenching these dealers in their current position will help consumers; to the contrary, the opposite inference seems the logical one, since entrenchment reduces the ability of Chevron to replace inefficient dealers with company-managed dealers. In the end, the record suggests, strongly, that the Act introduces a gratuitous set of complications for no apparent public

purpose. It allows the local dealers to hide behind the ostensible interests of the consumers for whose welfare they are supremely indifferent.

If, contrary to the dictates of economic theory, the aid given to the tenants somehow advances the public interest, it should be treated like a public function and discharged from general revenues, not inflicted upon landlords *sub rosa*. Rent control, after all, is expensive, and public financing would force those who impose the system to bear its costs. We might then get an honest revelation of the intensity of public preferences. In other words, application of the just compensation principle here would facilitate political deliberation and make transparent the benefits and costs of government regulation. If this increased transparency and political accountability reduces the frequency and extent of a subsidy—that should count as a benefit, and not a disadvantage, of judicial review.

C. Hawaii's Act 257 Constitutes A *Per Se* Violation Of The Takings Clause Because It Effects A "Physical" Taking.

While we think that the analysis offered by the court of appeals was correct in its result, it is nonetheless defective for a very fundamental reason. It does not examine how the distinction between "regulatory" and "physical" takings plays out in the context of rent control. Examined closely, it is apparent that this distinction, applied to rent control regimes, is unsound: Rent control is a paradigmatic physical taking and must be analyzed as such.

1. The "regulatory"/"physical" distinction, applied to rent-control, is untenable. A statute that compels transfer of the possession and the use of the landlord's property to the tenant is plainly a physical taking of a property interest in both an ordinary, and legal, sense of the term "taking"; only precious rhetorical slight-of-hand allows otherwise.[13]

[13] Indeed, as a preliminary matter, all "sticks" within the "bundle" of property rights should be treated as having equal dignity. Nonetheless, for our purposes here, we shall assume that any restriction on the use of property is subject to a lower level of scrutiny than a system in which the owner of property is required to forfeit his right to exclude. *Contrast Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978), *with Kaiser Aetna v. United States*, 444 U.S. 164 (1979).

Under ordinary leases, the property reverts to the landlord at the end of term. However, most rent control statutes, including Act 257, prevent that from happening and thus exclude the landlord from possession. *See, e.g.*, Pet. App. 3 (providing that "renewal" of all existing francishes "shall not be scheduled more frequently than once every three years"); *id.* at 2-3 (barring landlord from converting rented, tenant-operated gas stations into company held, company-operated property at the expiration of the term). Just that result was viewed as a physical taking in the case of the holder of a reversionary interest in a determinable fee simple, *see Preseault v. United States*, 100 F.3d 1525, 1540 (Fed. Cir. 1996) (discussed *infra*). There is no reason why the reversionary interest of a term of years at issue here should be treated in a different fashion.

Indeed, the conception of property as a bundle of rights in a discrete thing, familiar to all students of the common law of property, is wholly disregarded in the rent-control context. To see why, consider the constituent protected interests of a fee simple absolute. A lease, like a life estate and a mortgage, is one of the limited estates that can be carved out of a fee simple. It is an ordinary property interest—in fact, one of the older estates in land. The lease differs from the fee simple in that it is always created by grant or devise, and never acquired by initial or adverse possession. The leasehold interest is therefore born of the contract and conveyance that gives shape to its terms.

For most leases, differences in contract rights are significant. For example, the contract will specify duration, renewal options, assignability, and the duties on each side. In a world without rent control, the parties regulate some of these questions by express agreement; others are regulated by

the set of default provisions created by law. The rent, like the price in a contract of sale, is one term that is almost always set by agreement, without which an executory contract for a future lease is too indefinite to be enforced.

Rent control statutes typically operate to take part of the landlord's interest in his reversion and transfer it to the tenant. In the typical case, they do so by compelling the landlord, usually in the context of a lease renewal, to convey an additional term of years for the benefit of the tenant, at a price determined by the state (typically though a specific administrative board or housing court established for the purpose.) That renewed term of years is an interest in property, whether definite or indefinite, just like the original lease. Its transfer deprives the landlord of the immediate right to possession that was reserved in the original conveyance. It is surely a transfer from landlord to tenant. Thus, there is a "taking of private property" in the sense of its physical occupation, both for the student of ordinary English and the expert in law. The tenant sits: the landlord, as noted, cannot remove him. He is reduced in status, in effect, to a leasehold creditor of property—even though legally he still owns that property.

In response, it may be said that rent control statutes differ from the ordinary taking of property because the state does not retain possession but directs by ordinance that the tenant use it for his own enjoyment. This distinction, however, is spurious; indeed, it renders the state scheme additionally suspect. As noted earlier, the public use limitation prevents taking property from A and giving it to B. Rent control, by contrast, operates as a constructive re-conveyance of the property from the state to the tenant in possession. This constructive reconveyance, in turn, makes the confiscation more politically palatable since a statute providing for naked transfer of possession could not of course be passed. In effect, the rent control statute employs arid legal formalism as a wedge for evasion of the political checks that the Takings Clause is designed to promote.

Here, the property interests at stake in Hawaii's challenged ordinance are indistinguishable from those in the ordinary rent control scheme described above. The statute compels the landlord or company to agree to a three year term for renewal and, in the context of renewal, prescribes the price of the rent. *See* Pet. App. 3. It permits the tenants to sublet without a corresponding price restraint. *Id.* at 4. Finally, it bars the landlord from converting a tenant-run station into a company-run station, limiting (if not extinguishing) the landlord's power to take possession at the end of the lease, and in many cases effectively forcing him to deal with existing tenants. His reversionary interest (consisting of his ability to re-possess at the end of the agreed term and to capitalize on his lease agreement during the term) is partially extinguished. The expropriation of that interest is even more explicit under Act 257 than in the typical rent-control statute, because the Act, by permitting unrestricted sub-leasing, gives the tenant a statutory interest that corresponds to the extra money that the landlord, as the holder of the reversionary interest, would have earned absent his dispossession.[14]

In short, Act 257, like any ordinary rent-control scheme, confiscates the landlord's reversionary interests. It is a "taking" of "property" (U.S. Const. amend. V), pure and simple.

2. The distinction between "physical" occupation and "regulatory" takings, applied to rent control, is not only

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[14] For this reason, many rent-control statutes ban sub-letting. *See, e.g.*, Robert Nozick, *Anarchy, State and Utopia* 270-71 (1974) ("So why do people find the subletting-allowed scheme unacceptable? Its defect is that it makes explicit the partial expropriation of the owner. Why should the renter of the apartment get the extra money upon the apartment's being sublet, rather than the owner of the building? It is easer to ignore the question of why he should get the subsidy given him by the rent-control law, rather than this value's going to the owner of the building.").

analytically difficult to sustain; it has eroded outside the realm of rent-control. The first point of departure is *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). In that case, the petitioner invoked the Takings Clause to bar the New York City government from installing telecommunication wires and switchboxes on his property without his consent. *Id.* at 423. The invasion was trivial in the extreme; it hardly constituted a complete "occupation" of the property. Even so the Supreme Court held that a permanent physical invasion had been effectuated and that the city therefore had to compensate the property owner. *Id.* at 438.

Rent control is far more invasive, since every rent control statute effectuates a forced and complete occupation of the landlord's premises by an unwanted tenant. Consider, for example, Section 3(a) of Act 257; it provides that an oil company cannot convert a rent-controlled dealer station into a company-run station. Pet. App. 2. That condition—the limitation on the landlord's ability to take possession of his property—forces the landlord to permit tenants to occupy the property against the landlord's will. That "physical invasion" is orders of magnitude more severe than the *de minimis* invasion struck down in *Loretto*.

The second point of departure is *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), where the Court recognized that the Takings Clause requires compensation when the state displaces (1) the landlord's present right to control entry to his property and (2) the landlord's right to future use. *Id.* at 178. In *Kaiser*, owners of a Hawaii fishing pond sought compensation after the Army Corps of Engineers attempted to limit their ability to develop the pond as a private marina. The Corp argued that the pond, linked to navigable water by a small channel, was subject to the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. § 403, which regulates navigable water within U.S. territory and mandates that the owner allow public entry to the waterway. *Kaiser Aetna*, 444 U.S. at 168. The Court upheld federal power to regulate navigation within the pond, since it was connected to a

navigable waterway under federal control. *Id.* at 179. But it nonetheless held that "the Government must condemn and pay [compensation] before it takes over the management of the landowner's property." *Id.*

Kaiser illustrates that the government compromises the rights of exclusive possession even when the only thing it does is allow third parties to enter the property of the landlord. *Id.* (restrictions resulted in "actual physical invasion" by third parties). Here, the decision to allow the independent dealers to remain in possession amounts to the government's reconveying the taken reversionary interest to the sitting tenant. Accordingly, it raises serious public use problems. Yet, even if that taking is sustained under *Midkiff*, full compensation, *i.e.* the fair market value of the property, is required after the regulation is in place.

Finally, in *Preseault v. United States*, 100 F.3d 1525 (Fed. Cir. 1996) ("*Preseault III*"), the Federal Circuit, relying in part on the express direction of this Court, forthrightly recognized that a reversionary interest in a determinable fee is a property right that may be physically taken, for which just compensation is required. *Preseault* involved railroad rights-of-way: turn-of-the century forced easements that had been imposed by the government during the development of rail transportation. *See Preseault v. Interstate Commerce Comm'n*, 853 F.2d 145, 147 (2d Cir. 1988) ("*Preseault I*"). These easements expired when railroad use was abandoned; in many cases they reverted to adjacent landowners under the relevant state common law of property. *Id.* To defeat such reversions, and preserve railroad rights-of-way for future use, Congress passed an act that (1) converted these easements into "biking and hiking trails" and (2) purported to preempt state property law to the extent it provided for the easements to revert to adjacent owners. *Id.* (citing 16 U.S.C. § 1247(d) (1983)).

Petitioners, who lived next to one of the expired rights-of-way, filed a takings challenge to enforce their reversionary rights under Vermont property law. In the first wave of

litigation, the case was appealed to this Court, which remanded for further determination of Vermont law. *See Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1, 16 (1990) ("*Preseault II*"). In the course of its opinion, however, the Court acknowledged that the reversionary interest may constitute a property right protected under the Takings Clause. *See id.* at 16 (suggesting that "some rail-to-trail conversions will amount to takings"). Justice O'Connor, concurring, put the matter emphatically: "Although the [government's] actions may pre-empt the operation and effect of certain state laws, those actions do not displace state law as the traditional source of the real property interests. . . . Any other conclusion would . . . pre-empt the rights guaranteed by state property law, a result incompatible with the Fifth Amendment." *Id.* at 22 (O'Connor, J., concurring).

After further proceedings, the Federal Circuit, sitting *en banc*, ruled in favor of the property owners. First, said the court, the property owners' reversionary interest is "uniformly treated at common law as a vested estate in fee" (*Preseault III*, 100 F.3d at 1534). Second, the taking was "physical" because it ousted the owner of his reversionary right to possession and transferred that interest to the current possessor, the government. *Id.* at 1538 (terming the case one of "physical occupation"). Third, that physical invasion must be accompanied by compensation: "[I]f the Preseaults have interests under state property law that have traditionally been recognized and protected from governmental expropriation, and if, over their objection, the Government chooses to occupy or otherwise acquire those interests, the Fifth Amendment compels compensation." *Id.* at 1550.

The Federal Circuit, notably, rejected the government's argument that state property rights must be interpreted against the background "expectation" of regulatory interference, as the "regulatory taking" line of cases would require. To the contrary, ruled the court:

> [A] physical occupation of one's property by the Government, *that is, a taking of a recognized property interest*, invokes a general expectation of compensation. The Government's reading reverses the sentences, standing the law on its head. They read it to say that an owner's subjective expectations of keeping or losing her property under various possible [regulatory] scenarios define for that owner the extent of her title. Just the reverse is true. It is the law-created right to own private property, recognized and enforced by the Constitution, legislation, and common law, that gives the owner an historically rooted expectation of compensation.

Id. at 1540 (emphasis added).

As *Loretto*, *Kaiser Aetna*, and *Preseault* underscore, it is time to put the distinction between "regulatory" rent-control and "physical" interference with vested property interests to rest. Attempts to ignore the obvious vested property interests at stake in rent control regimes are labored and unconvincing; they sit uneasily with the physical takings cases; and they are inconsistent with the baseline common law rights articulated by the states. The distinction is a doctrinal dead-end. [15]

3. Finally, Hawaii should not escape the legal implication of its physical taking by claiming that rent payments are themselves a form of "just compensation."

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[15] It is also, incidentally, an anomalous artifact of the "emergency" World War I-era rent control system, when the federal government, to address the "sudden influx of people to Washington caused by the needs of Government and the war," imposed rent control to avoid "congestion" in Washington, D.C. *Block v. Hirsh*, 256 U.S. 135, 157 (1921). Those controls were hastily upheld based not only on an immature takings law but on a poor understanding of the economics of rent regulation. *Cf.* Milton Friedman & George Stigler, *Roofs or Ceilings, the Current Housing Problem*, in *Rent Control: Myths and Realities* 87 (The Fraser Inst. ed. 1981) (discussing the flawed economic reasoning underpinning World War II-era rent control statutes).

This should be obvious: Every rent control statute has only one *raison d'etre*—to ensure that the landlord's rent is kept below the fair market rental value of the property. While Hawaii insists its rent control formula is sound, it does so on the assumption that all the appreciation in the value of the property is fair game for the state. Indeed, on its deferential view, the rental rollback need not be limited by this, or any other, formula. As a result, its constant harping on the importance of deference invites the state to cut rents more and more—so long as Chevron has enough money to pay for its ground lease. The more prudent that Chevron is in its own affairs, the earlier it acquired its property, and the more financially sound its operations, then the greater its vulnerability to political manipulation if the state has its way.[16]

The just compensation requirement has bite only if this Court requires measurement of the difference between the market value of the rental prior to, and after, regulation. Thus, the "just compensation" inquiry asks this pointed question: has the landlord been supplied with an equivalent in value to the lost property interest, so that he or she is indifferent between retaining the leasehold interest and the substitute compensation? In other words, if the state evicted A from a $100,000 house, it could not satisfy its constitutional obligation merely by paying A $60,000 in exchange; it would still owe $40,000 for the dispossession. Similarly, Hawaii cannot survive scrutiny when it forces oil companies to accept lower rents than the going market rates. Indeed, the state's improper delegation to tenants of its own duty to compensate imposes an additional risk—the lessee's insolvency—on the landlord, on top of the reduction of his property value. Rent control statutes, quite bluntly, never provide just compensation to the landlord.

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[16] *Compare United States v. Aluminum Co. of Am.*, 148 F.2d 416, 430 (2d Cir. 1945) ("The successful competitor, having been urged to compete, must not be turned upon when he wins.") (Hand, J.).

The irony here is that, in the long run, the system of regulated rents enacted by Hawaii works against the asserted interest of the statutory scheme: the prevention of the (as yet unproven) risk of future vertical integration by large out-of-state leaseholding corporations. If Act 257 is upheld, one out-of-state landlord—Chevron—who has agreed to allow tenants in possession now faces the risk (1) that its tenants cannot be evicted at the end of the lease, and (2) that its tenants, while in possession, will pay a rent equal to a fraction of the property's market value. The fate of Chevron may well convince other out-of-state corporations that maintain a similar system of independent franchisees to invest in Hawaii only through vertically integrated systems (if they invest at all). If so, the Act may well increase the concentrated power of out-of-state corporations at the expense of local residents[17]—rendering, perversely, Hawaii's flagrant violation of constitutional norms as quixotic as it is illegal.

CONCLUSION

Once the correct framework is understood, this case is easy, whether brought under the Due Process or the Takings Clause. The restrictions on rent unquestionably harm the oil companies on whom they are imposed. That harm demands either justification or compensation. Of justification there is none, for this case involves neither physical externalities between neighbors nor an abuse of monopoly power. The most the state can say is that it has decided to confiscate property today in the off chance that it might protect against some imagined form of abuse tomorrow. That premature interaction could be invoked in any conceivable case; it does not offer a sufficient public reason to deny the oil companies

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[17] *Cf. Fitzgerald v. Chrysler Corp.*, 116 F.3d 225, 228 (7th Cir. 1997) (Posner, J.) (noting that if the RICO "enterprise" requirement were interpreted in a way that exposed corporations to greater liability when using a system of independent distributors, RICO would perversely encourage vertical integration).

compensation for the property interests that have been forcibly taken from them.

For the foregoing reasons, the decision of the U.S. Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted.

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